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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 756

MARGARET B. CARPENTER AND LEROY E. CARPENTER,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

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LEO GALLAGHER,
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Of Counsel.

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I.

The Petition for Writ of Certiorari Filed by the Petitioners in the Supreme Court of California was the Appropriate Procedure, Under the Law and Practice of California, Properly, Adequately and Timely to Assert the Denial of Federal Due Process.

Despite early intimations by the California Courts to the contrary, the *present* law of California is that:

(a) A petition for writ to review a judgment of a California trial court is an appropriate remedy in the Supreme

Court of California, to review a judgment of a lower court, even though there is a right of appeal from said judgment; and

(b) A petition for review will lie where the judgment is either unauthorized or abridges constitutional right.

The latest decisions of the Supreme Court of California broaden widely the scope of the writ of review.

Thus in *Fortenbury* v. *Superior Court,* decided October 14, 1940, 104 Cal. Dec. 407, 106 P. (2d) 411, the California Supreme Court thus summarizes the present California law:*

> "The term jurisdiction (as affecting the scope of the writ of review) originally included only the right to hear and determine concerning the subject matter in a particular case. But the modern tendency has been to broaden that meaning, particularly where the right to review a decision by *certiorari* or other prerogative writ is the question for decision. A court may have jurisdiction of the cause of action and of the parties, but it may lack the authority or power to act in the case except in a particular way. Under such circumstances, it is now generally held that the court had no jurisdiction."

Similarly, in a decision even more recent than the above, the Supreme Court of California in *Abelleira* v. *District Court of Appeal* (Feb. 7, 1941), 2 Cal. Dec. 254, 109 P. (2d) 945, reviewed the present law of California and stated it to be that certiorari (or review) and prohibition will lie in the Supreme Court of California to annul a judgment of a lower California Court when that Court lacks jurisdiction to

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* Counsel for the petitioners in the case at bar were counsel for the petitioners in the *Fortenbury* case. Counsel for the respondent in the instant case were attorneys for the respondent in the *Fortenbury* case. The respondent in the instant case studiedly avoids any mention of the *Fortenbury* case in its brief in this Court.

make the particular order challenged. The Court declared: "In its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations" (where there is a complete absence of jurisdiction by a California trial court over the parties or subject matter).

> "For the purpose of determining the right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. * * *
>
> "On a number of occasions the courts of this State have recognized the conflicting senses in which the term 'jurisdiction' is used, and have emphasized the point that in applications for prohibition or certiorari, the broader meaning is involved. * * *
>
> "The foregoing observations, while by no means a complete description of the term, nevertheless, serve as a warning against a too restricted meaning. The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the *requirement of due process*,* some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction, insofar as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari."

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* Italics ours.

It seems clear therefore that where a judgment of a California trial court abridges due process, Federal or State, a writ of review will lie in the courts of California to challenge and annul such a judgment.

In accord, is an early decision of the California Supreme Court *McClatchey* v. *Superior Court,* 119 Cal. 413, 416, in which a judgment of a trial court was adjudged void because it abridged "a constitutional right (of a defendant) to be heard in his defense."

The filing by the petitioners, of a petition for a writ of review in the California Supreme Court, to set aside a judgment based upon an abridgment of Federal due process, was, accordingly, an appropriate procedure under California law.

Nor does the fact that there is a right of appeal, prevent an aggrieved litigant under California law and practice from challenging a judgment offending Federal due process, by a petition for writ of review.

Here, again, *Fortenbury* v. *Superior Court, supra,* unmentioned by the respondent in its brief, supports the above proposition. In the *Fortenbury* case the petitioner for a writ of review in the California Supreme Court had a right of appeal from the order of the California trial court complained of by the petitioner.

Section 964, *Code of Civil Procedure of California.*

An order for an injunction is an appealable order. The petitioner sought relief from a void order by a petition for a writ of review. The writ was ordered to issue by the California Supreme Court because the petitioner's constitutional rights to freedom of expression under the Federal Constitution had been abridged by the order entered in the trial court.

Other California cases in accord include *Evans* v. *Superior Court*, 14 Cal. (2d) 563, 580. The Supreme Court of California declared in that case:

> "Thus this remedy (of the writ of prohibition) has been invoked in numerous cases to prohibit further proceedings by the Superior Court directed toward the enforcement of the preliminary injunction previously issued by such court."

Under California practice, as indicated above, a preliminary injunction is an appealable order; the scope of the writ of prohibition and the writ of certiorari is identical.

Other California cases are:

Brock v. *Superior Court*, 9 Cal. (2d) 291;

Reclamation District v. *Superior Court*, 191 Cal. 672;

State Board of Equalization v. *Superior Court*, 5 Cal. App. (2d) 374, 379.

Moreover, under California law,

> "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds or bars anyone."
>
> *Freeman on Judgments*, Sec. 117 (cited in *Bennett* v. *Wilson*, 122 Cal. 509, 55 Pac. 390).

II.

The California Courts Never Have Adjudicated that Hamilton was Not Guilty of Fraudulent Representations. Respondent's Assertion that: "The Necessary Effect of the Final Judgment in Hamilton's Favor was that He Did Not Make Them" (the Fraudulent Representations) is Untrue.

The only issue determined by the California Courts, and hence the only issue actually adjudicated was that the petitioners did not make that thorough-going inspection of the

premises which would have resulted in a discovery by them that Hamilton had committed the fraud complained of. Indeed, the decision of the District Court of Appeals is founded upon the premise that Hamilton was *guilty* of the fraud charged.*

Moreover, the decision of the California Supreme Court in the foreclosure action (R. 47) determined in effect that in the damage action, the order for a new trial by the trial court is co-existent with the judgment notwithstanding the verdict ordered by the District Court of Appeals in the same action; the District Court of Appeals made said order for a new trial as to all the issues the basis for declaring the jury judgment in favor of the petitioners vacated and for dismissing Hamilton's appeal from said vacated judgment.

Clearly the order for a new trial as to all the issues, which vacated the judgment, vacated also all of the proceedings of the trial in the damage action.

The highest state court of California has ruled, in effect, that the judgment notwithstanding the verdict in favor of Hamilton in the damage action was entered in the vacated proceedings of the vacated trial and is, accordingly, not a judgment on the merits.

In the foreclosure action the California Supreme Court (R. 48, 49) summarily affirmed the abrogation of the fundamental principle of clean hands in equity, which is inherent in Federal and State due process; and is not a remedy but a self-imposed limitation of a court of equity, separate from the rights of either party.

Accordingly, the petitioners have been denied Federal due process, for which denial the only hope of relief now

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* This matter is discussed in the Petition for a Writ of Certiorari, pages 9 to 11; that discussion is accordingly not duplicated herein.

available to them lies in such solicitous consideration as they may receive by this Court.

Respectfully submitted,

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